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January 18, 2011

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**VIA COURIER**

Ms. Karen V. Gregory  
Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room 1046

Re: Notice of Inquiry – An Analysis of the European Union Repeal of the  
Liner Conference Block Exemption

Dear Ms. Gregory:

Enclosed herewith is the response of Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG to the above-referenced Notice of Inquiry.

A copy of this letter and its enclosures has been provided for your acknowledgment of receipt.

Sincerely,

COZEN O'CONNOR

By: Wayne Rohde

Enclosures

WRR

## FMC E.U. Study Notice of Inquiry Questions

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## Section A: General Questions

1. Based on your experience since September 2006 (when the European Union announced its decision to terminate the block exemption for liner shipping conferences to take effect October 2008), what impacts, if any, have you identified on your company's commercial activities, in any trade lane, that you would attribute to the termination of the E.U. conference block exemption? Please explain. If you believe there have been such impacts, please indicate when that impact first occurred.

The period between September 2006 and today has to be split into two separate eras, the period between the legal repeal in 2006 and the effective date in October 2008, and the post conference era.

The announcement period until October 2008 could be characterized by intensified internal compliance activities and increasing legal expenses in preparation for the effective date of this repeal, whereas the trade impact was relatively small due to an unchanged legal framework Hamburg Süd was operating in.

The second period however is characterized by significantly higher rate volatility on the trades affected by this repeal (cf to Annex 1). As Annex 1 demonstrates, the rate volatility in all three of the trades depicted increased significantly after the third quarter of 2008. However, the volatility in the U.S.-Australasia trade, which retained carrier antitrust immunity, was not as great as in the trades where such immunity did not exist. Hamburg Süd believes that Annex 1 evidences the accuracy of what many have said about carrier antitrust immunity for many years – that it does not eliminate the effect of market forces, but it does help in eliminating some of the extreme fluctuations that result from market conditions when such immunity does not exist.

In addition to increased rate volatility, we believe the period after October of 2008 is characterized by reduced pricing transparency for customers due to carrier individual pricing policies. Whereas the existence of agreements allowed carriers to adopt common surcharges or guidelines on surcharges, the elimination of such immunity has led to a proliferation of different surcharge types and calculation formulae with different effective dates. While some might argue this is a sign of increased competition, it also hindered transparency and made things more complicated for customers.

Hamburg Süd has noticed that shippers have responded to the individual carrier approach to surcharges by pushing for all-in rates. Mainly big freight forwarders and customers were able to benefit from this tendency, whereas smaller companies struggled to do so. This means market complexity has had the largest adverse impact on those customers least equipped to deal with it, both in terms of tracking the amount of the charges and dealing with the risk of fluctuations in those charges.

The elimination of antitrust immunity has also had a negative impact in areas other than pricing. For example, various shipper organizations have complained about the absence of an appropriate carrier forum to discuss operative or legal issues such as the new EU customs procedure.

The absence of antitrust immunity has also complicated the sharing of information that helps carriers evaluate markets and plan their investment strategies. Since vessels must be ordered years before they are needed, carriers must have the most accurate forecasts possible of likely market developments. Carrier agreements often play an important role in evaluating markets by enabling carriers to compare their individual assessment of a market

with those of other carriers, thereby helping each carrier to improve the accuracy of its own forecast. Although Container Trade Statistics Ltd., a former ELAA subsidiary, has been created to compile trade data on behalf of various lines, the fact that this arrangement is subject to EU competition laws limits the types of data that can be collected and shared, as well as the timeliness of some of the data that is distributed.

2. Based on your experience since October 2008 (when the E.U. exemption for liner conferences was terminated) has any class of shipper or class of vessel-operating common carrier received a competitive advantage or been put at a competitive disadvantage as a result of the E.U. decision to terminate the exemption? If so, please explain.

In light of the aforementioned reduced market transparency and increased market complexity, large shippers tend to have a competitive advantage when it comes to monitoring the markets and negotiating arrangements that benefit them. Smaller shippers, who lack the resources to monitor the market as effectively, and who lack the cargo volumes that may be necessary to win concessions from their carriers, are at a disadvantage vis-à-vis their larger competitors. The same applies for smaller carriers, as they have to accept a higher cost per TEU for market surveillance as compared to their larger rivals.

3. Based on your experience since October 2008 (when the E.U. exemption for liner conferences was terminated), have differences between U.S. and E.U. liner shipping competition regulations created any problems for your company? If so, please explain.

As noted above, carriers were forced to develop and implement individual pricing formulae in European trades, whereas previously conferences helped to create a greater level of uniformity, particularly with respect to surcharges. Hamburg Süd has been attempting to harmonise surcharge across many trades, but is reluctant to apply a surcharge recommended by a U.S. discussion agreement to a European trade, for fear that the European competition authorities would view this as evidence of an unlawful discussion of the European trade among carriers.

4. Does your company view cooperation among ocean carriers in operational agreements (e.g., vessel sharing agreements, alliances, consortia, etc.) as generally having a positive, neutral or negative impact on the availability or cost of liner shipping services? Please explain. Does the E.U. market share threshold of 30% for such operational agreements have any effect with respect to that impact? If so, please explain.

Hamburg Süd agrees with the European Union, which observed:

"Consortia ...generally help to improve the productivity and quality of available liner shipping services by reason of the rationalisation they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilisation of port facilities. They also help to promote technical and economic progress by facilitating and encouraging greater utilisation of containers and more efficient use of vessel capacity. For the purpose of establishing and running a joint service, an essential feature inherent in consortia is the ability to make capacity adjustments in response to fluctuations in supply and demand." [cf. EU BER 906/09 Margin Number 5]

Hamburg Süd is convinced that consortia between carriers are indispensable to achieve economies of scale with respect to the deployed vessel size, facility negotiations and sailing frequency. Based on these advantages the individual consortium parties are able to offer a wider service scope compared to lines with individual standalone services, and reduce cost per TEU, the benefit of which will in the long run be passed on to customers. Consortia also assist to reduce the market entrance barriers for smaller consortium partners and facilitate

the development and deployment of specialized vessels (gear, reefer plugs, shallow draft) which promotes the technical progress as mentioned in the EU block exemption regulations.

However, the 30% market share threshold applied by the EU is a critical burden – in particular to smaller niche markets – imposing additional legal expenses for self-assessments in order to justify the threshold exceedance. This may prevent parties from entering a small niche market where their operation could be viewed as an oligopoly. It also creates an unhealthy level of uncertainty that hinders effective investment planning and asset deployment. In other words, without the certainty of antitrust immunity, there is a risk that carriers will plan their services based on legal considerations rather than on the needs of their customers.

## **Section B: Questions about the North Atlantic Trade (North Europe/U.S.)**

5. Approximately what percent of your company's freight earnings (lines, OTIs) or shipping expenses (shippers) involves international shipping in the North Europe/U.S. trade? Does your company's business involve US imports (westbound service) only, U.S. exports (eastbound service) only, or both? Please explain briefly.

The freight earning share of all North Europe – US services is expected to be 3.5% of the Hamburg Süd turnover in 2010. This is the combined share of westbound shipments from Europe and eastbound shipments from the USA. At present, Hamburg Süd offers two services between North Europe and the U.S.A. The North Atlantic service has been operated since 2006 in differing service configurations (currently joint service with Hapag-Lloyd, OOCL, NYK and ZIM), and a North Europe – US West Coast service has been offered since the 2<sup>nd</sup> quarter 2010 in transshipment via Cartagena / Colombia. For a more detailed history of Hamburg Süd's participation in the North Europe/U.S. trade, see the response to Question #6 below.

6. How, and to what extent, did the recent economic recession (2008 – 2009) affect your company's liner shipping-related business in the North Europe/U.S. trade? Please explain.

The economic crisis affected the Hamburg Süd liner business between North Europe and the US East Coast significantly.

Hamburg Süd entered the North Atlantic Trade in February 2006 for the first time by launching a fortnightly tri-continent service (North Europe – North America – Australasia). The standalone service used six 1800-2400 TEU class vessels. One year later, in March 2007, the service matured from a fixed-day fortnightly to a fixed-day weekly service by doubling the deployed fleet. Aiming to strengthen the common market position in a competitive environment Hamburg Süd and Maersk decided to jointly operate the tri-continent service in May 2008, whereby the North Atlantic capacity was dedicated to Hamburg Süd exclusively. Each partner provided six 2800 TEU class vessels at that time.

Due to a considerable volume and freight rate decline, Hamburg Süd was forced to terminate the direct transatlantic service in early 2009. In order to maintain a presence in the market, Hamburg Süd became slot charterer on the Grand Alliance/Zim North Atlantic Service with a weekly allocation of 900 TEU westbound and 500 TEU eastbound in June 2009. This is a considerable reduction in the capacity offered by Hamburg Süd in this trade. The revenue share of the North-Europe to US trade decreased during the economic recession from 3.3% to 2.4%. The respective Hamburg Süd rate index (CTS rate index method) decreased by 19 index points on average in 2009 and has not (YTD 2010) fully recovered yet.

From February 2010 onwards, Hamburg Süd has offered about 350 TEU weekly between U.S. West Coast and North Europe in transshipment via Cartagena.

7. Based on your experience prior to July 2008, when the Trans-Atlantic Conference Agreement (TACA) disbanded, did the existence of TACA have any impact on your liner shipping-related business in the North Europe/U.S. trade? If so, please explain.

Although Hamburg Süd was not member of the TACA agreement, Hamburg Süd benefited from the relatively stable market conditions it believes that agreement helped foster. As explained in response to Question #1, since the repeal of the block exemption for conferences, market volatility and complexity have increased.

8. Based on your experience in the period from October 2008 to the present (i.e., since the E.U. block exemption was terminated), has there been any significant change(s) in liner services in the North Europe/U.S. trade that you attribute to the E.U. terminating the block exemption? For example, changes in:

a. the level of freight rates and surcharges:

There appears to be a trend to ask for all-in rates from almost all shippers aiming to negotiate stable freight rates during the contract period. The freight rate/all-in rate level fluctuation is significantly dependent on the capacity situation in the market. Overcapacities lead immediately to significant rate decreases whereas undercapacities – not seen since 2008 - tend to have the reverse effect. We believe these fluctuations are exacerbated by the lack of a forum for carrier discussions of market conditions.

b. the frequency with which rates or surcharges are adjusted upward or downward (rate volatility):

The repeal of the block exemption has increased rate volatility (cf. Annex 1).

c. the assessment of surcharges:

As noted above, the repeal of immunity has resulted in an increase in the number of surcharges, which are applied at different levels for each line.

d. the level of competition among ocean carriers:

In our view, the level of competition between the carriers has not changed since the conference abolishment. Carriers have always competed vigorously with one another, irrespective of whether they are members of a conference or consortium. However, we believe the nature of the competition has changed somewhat. We believe the increased rate volatility in the post-2008 period where peaks were higher and troughs were deeper are also a result of the abolishment of conferences which provided a levelling effect for the benefit of shippers and carriers.

e. the service contracting practices or terms offered by ocean carriers:

As mentioned above – shippers tend to prefer all-in rates.

f. the availability of vessel capacity and container equipment; or

Hamburg Süd did not observe any significant change with respect to the availability of vessel capacity or container equipment related to the conference abolishment in Europe.

g. the level or quality of liner services (including customer service, billing accuracy, etc.)

Hamburg Süd cannot verify any significant change with respect to the quality of liner services related to the conference abolishment in Europe.

9. For CY 2010 to date, please estimate the percentage of your annual business (by volume) in the North Europe/U.S. liner trade that moved under (a) annual (or longer) service contracts, (b) shorter-term freight agreements, (c) spot rates, and (d) other (please specify). Has that changed significantly since October 2008? If so, please explain.

Please find below Hamburg Süd's reply separated per trade direction:

	Westbound	Eastbound
a)	38%	85%
b)	57%	10%
c)	5%	5%

Although the majority of the eastbound business is moving under annual contracts it is important to note that annual contracts are often negotiated with low volume commitments and are frequently re-negotiated during their life-span making most of them not very different from short term contracts.

10. Following repeal of the E.U. block exemption, ocean carriers created a global information system under Container Trade Statistics Ltd. (CTS) in which a majority of ocean carriers serving the North Europe/U.S. trade participate. CTS provides certain data free on its web site, including indices of the carriers' aggregated average revenue per TEU by month. CTS also sells other data. To what extent, if at all, does your company access and use CTS Europe/U.S. trade data, and (if it does so) for what purpose(s)?

Hamburg Süd was member of the European Liner Affairs Association (ELAA) and is founding member of World Liner Data Ltd (WLDL), the mutual organization CTS is collecting data for. Hamburg Süd is, therefore, submitting and analysing individual and aggregated trade data on a regular basis. Market transparency, such as provided by CTS, is vital for all market participants in order to evaluate their investment decisions and market strategies. Proper product positioning and market monitoring is an essential part of the normal business behaviour upon each market Hamburg Süd is active in. Since Hamburg Süd has not been a member of TACA, this now provides us with better market information than we had previously.

**Section C: Questions about the Transpacific Trade (Far East/U.S.)**

Not applicable

**Section D: Questions about the Europe – Asia Trade (Far East/Europe)**

Not applicable

**Section E: Comparisons Among Trades**

Not applicable

**Section F: Additional Questions for Vessel-Operating Common Carriers****FOR VOCCs ONLY:**

24. Please estimate the percentage of your liner revenues (globally) that were earned in each of the following trade lanes during CY 2010 to date:

The percentage of Hamburg Süd liner revenues generated in the North Europe – US services will be approximately 3.5% in 2010. The remaining 96.5% has to be accumulated to the "all other liner trades" owing to the fact that Hamburg Süd is neither active in the Far East – US nor in the Far East – Europe trade.

- |                                      |        |
|--------------------------------------|--------|
| a. North Europe/U.S. liner trade     | 3.5 %  |
| b. Far East/U.S. liner trade         | %      |
| c. Far East/Europe liner trade       | %      |
| d. All other liner trades            | 96.5 % |
| e. Total (all liner trades combined) | 100 %  |

25. In each of the three major East-West trades, please estimate the percent of cargo your company carried for beneficial cargo owners (BCO) accounts, (b) OTI accounts, (c) other accounts (if any, please explain) during CY 2010 to date:

As already mentioned above Hamburg Süd is active just in the North Europe – US trade and in none of the other listed trades. Hamburg Süd refers therefore only to North Europe – US service:

Westbound

- |                                  | BCO | OTI | Other |
|----------------------------------|-----|-----|-------|
| f. North Europe/U.S. liner trade | 30% | 70% | ___%  |

g. Far East/U.S. liner trade      \_\_\_%   \_\_\_%   \_\_\_%

h. Far East/Europe liner trade    \_\_\_%   \_\_\_%   \_\_\_%

## Eastbound

	BCO	OTI	Other
f. North Europe/U.S. liner trade	45%	55%	___%
g. Far East/U.S. liner trade	___%	___%	___%
h. Far East/Europe liner trade	___%	___%	___%

26. In each of the three major East-West trade lanes, please indicate which lanes have tended to be the relatively most profitable and which was the relatively least profitable for each year between 2006 and 2010 (inclusive). [Write M for most, and L for least.]

	Far East/U.S.	Far East/Europe	North Europe/U.S.
a. 2006	_____	_____	_____
b. 2007	_____	_____	_____
c. 2008	_____	_____	_____
d. 2009	_____	_____	_____
e. 2010	_____	_____	_____

If those rankings changed significantly during the 2006 through 2010 period, please explain the reason(s) for the change.

**- Not applicable**

27. Based on your experience during the period from January 2006 to the present, have there been any significant changes in the nature of your business in the North Europe/U.S. liner shipping market related to changes in:

a. Seasonality of cargo movements;

b. Commodity values;

c. Directional cargo imbalances (imports vs. exports);

Please refer to annex 2 (trade imbalance sheet), which shows the historical relationship between Hamburg Süd's eastbound and westbound lift.

d. Number of carriers serving the trade; or



e. Minimum scale (# and size of vessels) needed to serve the trade efficiently

Hamburg Süd believes that several carriers have reduced their presence in the trade over the past several years. While the number and size of vessels needed to operate in the trade have not changed, the trade is characterized by extremely slim margins. Given those margins, it is extremely critical for Hamburg Süd to match capacity to cargo demand as closely as possible. This assists in reducing Hamburg Süd's exposure to losses given the higher degree of rate volatility indicated above. Volatility drives capacity and service levels down, especially in historically marginal trades like the North Europe – US trade. In other words, rate volatility can impact service levels in both the short and long-term.

28. Based on your company's experience in the North Europe/U.S. trade, please identify any substantial changes that occurred in your liner business (operations, marketing, pricing, etc.) in the two years following repeal of the E.U. liner conference exemption (CY 2009 and 2010) as compared with the two years preceding the repeal (2006 – 2007)? If any, please explain.

From an operational perspective, as noted above in response to Question #6, our service has changed considerably over this period. Our marketing has not changed appreciably. With respect to pricing, as noted above there is a trend toward increased use of all-in rates and shorter term contracts with lower volume commitments. Shorter, less meaningful contracts are a natural response to increased volatility but, at the same time, contribute to further volatility because they lack the stabilizing influence of longer-term contracts with larger volume commitments.

29. Based on your experience during the period from January 2006 to the present, have there been any significant changes in the nature of your business in the Far East/U.S. liner shipping market related to changes in:

- a. Seasonality of cargo movements;
- b. Commodity values
- c. Directional cargo imbalances (imports vs. exports)
- d. Number of carriers serving the trade; or
- e. Minimum scale (# and size of vessels) needed to serve the trade efficiently

**- Not applicable**

If so, please identify and explain those changes.

30. Based on your experience during the period from January 2006 to the present, have there been any significant changes in the nature of your business in the Far East/E.U. liner shipping market related to changes in:

- a. Seasonality of cargo movements;
- b. Commodity values;
- c. Directional cargo imbalances (imports vs. exports);
- d. Number of carriers serving the trade; or
- e. Minimum scale (# and size of vessels) needed to serve the trade efficiently

If so, please identify and explain those changes.

**- Not applicable**



